



**Conservative
Animal Welfare
Foundation**



The Retained EU Law (Revocation and Reform) Bill and its impact on laws relating to farmed animals

The hidden risks to some of our strongest farm animal protection laws

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Contents

- Overview p.3
- Legal Opinion:
 - Background to the REUL Bill and what it intends to do p.4
 - How did the UK give effect to EU law until 2021? p.5
 - Other implementation of EU law p.6
 - Development of the REUL Bill p.6
 - EU-derived subordinate legislation (EDSL) p.7
 - Retained Direct EU Legislation (RDEUL) p.8
 - Extension of the sunset (clause 2) and the power to preserve (clause 1(2)) p.9
 - Repeal of section 4 of EUWA (clause 3 of the REUL Bill) p.9
 - Further provisions of the REUL Bill p.10
 - Specific farm animal protection legislation in the context of the REUL p.11
 - The Welfare of Farmed Animals Regulations (WOFAR) p.11
 - The Transport of Farmed Animal Regulations p.17
 - The Welfare of Animals at the Time of Killing (WATOK) p.20
- Summary p.24

Overview

1. The Conservative Animal Welfare Foundation commissioned Advocates for Animals law firm to consider the impact of the Retained EU Law (Revocation and Reform) Bill (“REUL Bill”) on farmed animal welfare legislation.
2. Advocates for Animals first set out some general comments on the operation of EU law and the interplay with domestic legislation, before moving on to consider the general farmed animal protections, and specific protections relating to transport and slaughter.
3. Advocates for Animals have focused on the main pieces of EU legislation dealing with general farming, transport and slaughter.
4. In summary, it is likely that much of the EU-derived laws which are designed to protect farmed animals will be revoked at the end of 2023 if the REUL Bill is enacted as drafted, unless they are preserved.
5. It is possible that the Animal Welfare Act 2006 will preserve indirectly some of the protections, but this is not guaranteed and is unlikely to offer the comprehensive welfare regime set out in the EU legislation.

Background to the REUL Bill and what it intends to do

6. In order to ensure that the UK did not have holes in its legal framework following its exit from the European Union (“EU”), it enacted the European Union (Withdrawal) Act 2018 (“EUWA”),¹ which applies to the whole of the UK (section 24). Whilst EU law technically ceased to apply in the UK from 11pm on 31 December 2020, EUWA provided the UK with a safety net, securing a legal framework upon which to build its post-Brexit position.
7. Broadly, there are five main categories of retained EU law (“REUL”), the source of which was either created or preserved under EUWA, and which continued to have effect following exit day (section 6(7)):
 - a. EU-derived domestic legislation (section 2 of EUWA): this is legislation that was passed by Parliament, the devolved legislatures, or under delegated powers, to help implement the UK’s EU obligations
 - b. Retained direct EU legislation (section 3 of EUWA): this includes EU regulations, relevant EU decisions directed at the UK, and EU tertiary legislation, but does not include EU directives
 - c. Retained directly effective provisions of EU law (section 4 of EUWA): this most notably includes the direct effects of EU treaties and directives, and seeks to preserve law previously given effect automatically under section 2(1) of the European Communities Act 1972.²
 - d. Retained EU and domestic case law (section 6 of EUWA): this consists of decisions of the Court of Justice of the European Union (CJEU) and UK domestic courts, whenever they adjudicated on the meaning and effect of EU law and EU-derived domestic laws
 - e. Retained general principles of EU law (section 6 of EUWA): these core principles inform (among other things) the hierarchy and interpretation of laws of EU-origin, and in particular the interaction between REUL and other domestic law
8. Other sections of EUWA also determine that the EU law that is excluded from REUL (section 5 and Schedule 1 of EUWA); the rules for amending, revoking and replacing different types of REUL, including when delegated legislation can and cannot be used (section 7 of EUWA); and the form of legislative scrutiny that would apply when REUL is proposed to be amended or revoked (Schedules 7 and 8 of EUWA).

¹ <https://www.legislation.gov.uk/ukpga/2018/16/contents>

² <https://www.legislation.gov.uk/ukpga/1972/68/section/2/2017-03-16>

How did the UK give effect to EU law until 2021?

9. The UK gave effect to all directly applicable EU law via section 2 of the European Communities Act 1972 (“ECA”), which gave domestic effect to general principles of EU law, including but not limited to the principles of “supremacy” and “direct effect”.
10. There is a recognised principle of EU law known as “EU supremacy”.³ This principle means that where there is a conflict between domestic law in a member state and EU law, EU law takes precedence and the domestic law is deemed incompatible with EU law. This applies not only to legislation but also to case law,⁴ save for in specific circumstances. This means that EU law, such as Council Directive 98/58/EC (the “Farming Directive”) and Council Directive 2008/120/EC (the “Pig Directive”) (as implemented by welfare of farmed animals regulations in each of the countries in the UK (“WOFAR”)) takes precedence over domestic legislation such as AWA if there is a conflict.
11. However, UK law can “go further” than EU law. For example, the Pig Directive and Farming Directive oblige member states to implement a set of minimum standards/principles, but the UK can build upon these to set out even higher welfare standards to be met. To the extent that the UK chose to build further upon EU law in this area, it will have done so in WOFAR.
12. Ordinarily, the general rule is that secondary legislation cannot conflict with primary legislation. However, WOFAR transposes the Pig Directive and the Farming Directive into UK law and so, whilst WOFAR is secondary legislation under AWA, the principle of supremacy of EU law means that it is not an inferior piece of legislation to AWA.
13. Section 5(2) of EUWA provides that the principle of supremacy of EU law still applies on or after exit day as far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day. However, the supremacy of EU law does not apply to any law made after exit day (section 5(1)). This means that the current position is that domestic law, such as the Animal Welfare Act 2006 (“AWA”) (and its Scottish and Northern Irish counterparts), is still overridden by EU-derived legislation made before exit day, such as WOFAR,⁵ where there are instances of incompatibility.
14. In terms of how EU law is implemented and enforced in the UK, there are several different mechanisms, which include what is known as Direct effect:
 - a. “Direct effect” means that not all EU law requires specific implementing legislation before individuals can rely on it in domestic courts. This largely applies to EU

³ Established by the case of *Costa v ENEL* (1964) Case 6/64

⁴ EUWA, s. 6(4) The Supreme Court is not bound by REUL and neither is the High Court of Justiciary in relation to some Scottish law matters.

⁵ Welfare of Farmed Animals (England) Regulations 2007; Welfare of Farmed Animals (Wales) Regulations 2007; Welfare of Farmed Animals (Scotland) Regulations 2010; and Welfare of Farmed Animals Regulations (Northern Ireland) 2012.

Regulations, which directly apply to the UK. An example would be Council Regulation 1/2005, which regulates the transportation of animals.

Other implementation of EU law

15. EU law that was not implemented via Direct effect needed implementing or supporting domestic legislation. Section 2(2) of the ECA created a general implementing power, whereby domestic regulations could facilitate the implementation of any EU obligations. This largely applies to EU directives that require domestic legislation to incorporate into the domestic legal framework. Examples include the Farming Directive and the Pig Directive.
16. Although most domestic implementing legislation was made directly under the ECA as secondary legislation, not all of it was. Some such law took the form of UK primary legislation (for example, the Equality Act 2010). In other cases, delegated powers contained in other Acts of Parliament were also relied upon. An example of this is WOFAR, which was created under AWA.

Development of the REUL Bill

17. In September 2022, the Government proposed a new bill that would extend to England, Wales, Scotland and Northern Ireland and would revoke certain EU law. This is the Retained EU Law (Revocation and Reform) Bill (“REUL Bill”). The REUL Bill makes it, on the whole, much easier to revoke, modify or replace REUL through secondary legislation. Notably, the Bill places a “sunset” on REUL, causing most, but not all, of it to expire at the end of 2023 (clause 1(1)). However, it allows REUL to be exempted (or “preserved”) from the sunset via statutory instrument (clause 1(2)). Clause 1 of the REUL Bill (the “sunset clause”) deals with the revocation of legislative instruments of both UK and EU origin (originally retained under sections 2 and 3 of EUWA). It reads as follows:

Sunset of EU-derived subordinate legislation and retained direct EU legislation

- (1) *The following are revoked at the end of 2023—*
 - (a) *EU-derived subordinate legislation;*
 - (b) *retained direct EU legislation.*
- (2) *Subsection (1) does not apply to an instrument, or a provision of an instrument, that is specified in regulations made by a relevant national authority.*
- (3) *The revocation of an instrument, or a provision of an instrument, by subsection (1) does not affect an amendment made by the instrument or provision to any other enactment.*
- (4) *In this section “EU-derived subordinate legislation” means any domestic subordinate legislation so far as—*
 - (a) *it was made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972, or*

(b) it was made, or operated immediately before IP completion day, for a purpose mentioned in section 2(2)(a) of that Act (implementation of EU obligations etc), and as modified by any enactment.

(5) In subsection (4) “domestic subordinate legislation” means any instrument (other than an instrument that is Northern Ireland legislation) that is made under primary legislation.

(6) Any reference in regulations under subsection (2) to an instrument or a provision of an instrument is, unless otherwise stated, to the instrument or provision as it subsists immediately before the time when the revocation under subsection (1) would otherwise apply in relation to it.

18. The sunset clause will cause two categories of REUL to expire at the end of 2023. These are:
- a. EU-derived subordinate legislation or “EDSL” (a subset of the broader category of EU-derived domestic legislation); and
 - b. Retained direct EU legislation or “RDEUL” (retained EU regulations, decisions and tertiary legislation).

EU-derived subordinate legislation (EDSL)

19. The House of Commons Library Research Briefing on the REUL Bill⁶ explains that EDSL is intended to include:
- a. Regulations made under section 2(2) of the ECA;
 - b. Orders in Council made under section 2(2) ECA;
 - c. Other delegated legislation if it refers to EU instruments; and
 - d. Delegated legislation made under other enactments, but for the purposes of implementing (what were then) EU obligations.
20. This might include, for example, The Welfare of Animals (Transport) (Scotland) Regulations 2006 or The Welfare of Animals at the Time of Killing (England) Regulations 2015, both of which were made under section 2(2) of the ECA. Another example is The Welfare of Animals (Transport) (England) Order 2006, which was not made under the ECA, but which is delegated legislation that refers to an EU instrument (Council Regulation (EC) No 1/2005).

⁶ <https://researchbriefings.files.parliament.uk/documents/CBP-9638/CBP-9638.pdf> (page 25-25)

21. EDSL does not include other EU-derived domestic legislation, being primary legislation contained in:
- a. a UK Act of Parliament;
 - b. an Act or Measure of a devolved legislature; or
 - c. Northern Ireland legislation.⁷
22. This legislation (i.e. EU-derived primary legislation) will become “assimilated law” from 2024 onwards.⁸
23. Assimilated law includes all EU-derived law which is either not contemplated by the sunset clause or which is preserved by a statutory instrument. “Assimilated law” is a new term introduced in the REUL Bill, which reflects the new status of EU-derived law in the domestic legislative picture.
24. An example of EU-derived primary legislation that will become part of assimilated law is the Equality Act 2010, which harmonised existing domestic law and implemented a number of EU directives.⁹ Another example is the Animals (Scientific Procedures) Act 1986, which was existing domestic legislation amended to implement Directive 2010/63/EU.
25. The wording of the sunset clause suggests, and the House of Commons Library Research Briefing supports,¹⁰ that the sunset clause does not apply to “anything” contained in primary legislation. This means that provisions of domestic primary legislation that refer to or implement EU legislation will be preserved automatically.

Retained Direct EU Legislation (RDEUL)

26. The second category of REUL to be revoked by subsection 1(1) is retained direct EU legislation (RDEUL).
27. RDEUL consists mainly of EU:
- a. Regulations,
 - b. Decisions and

⁷ <https://researchbriefings.files.parliament.uk/documents/CBP-9638/CBP-9638.pdf> (page 25)

⁸ For example, the Equality Act 2010 and the Health and Safety at Work Act 1974, would not expire under clause 1, even though they are EU-derived domestic legislation under section 2 of EUWA. They would instead form part of “assimilated law” from 2024 onwards (see clause 6).

⁹ Such as Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

¹⁰ <https://researchbriefings.files.parliament.uk/documents/CBP-9638/CBP-9638.pdf> (page 25)

c. Tertiary legislation.

28. An example of REDUL would be Council Regulation (EC) No 1/2005 on the protection of animals during transport. Another example is Commission Decision 2002/994/EC concerning certain protective measures with regard to the products of animal origin imported from China.

Extension of the sunset (clause 2) and the power to preserve (clause 1(2))

29. Clause 1(2) creates the power for Ministers and devolved authorities to exclude an instrument of EDSL or RDEUL from the sunset clause (“the power to preserve”). This can be done by regulations. If an instrument is excluded from the sunset clause, it will form part of “assimilated law” at the end of 2023.

30. Clause 2 of the REUL Bill provides flexibility to postpone the revocation of specified legislative instruments covered by clause 1 by permitting the sunset clause to be extended by regulations in relation to specified legislation. However, there is a longstop date of 23 June 2026.

Repeal of section 4 of EUWA (clause 3 of the REUL Bill): treaty provisions and direct effect

31. Clause 3 of the REUL Bill revokes section 4 of EUWA, which preserved rights, powers, liabilities etc recognised in domestic law by virtue of section 2(1) of the ECA (now repealed). Section 4 of the EUWA was intended as a “sweeper provision”, capturing the legal effects of EU law, rather than specific legislative provisions, and its application often requires judicial input.

32. The breadth of this provision is highlighted by the wording of section 2(1) of the ECA, which states the following:

a. *“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable EU right” and similar expressions shall be read as referring to one to which this subsection applies”*

33. The implications of this revocation are difficult to assess, and this concern is reflected in the House of Commons Research Briefing Paper, which states:¹¹

a. *“Assessing the implications of the repeal of section 4 of EUWA is more challenging than assessing the revocation of specific EU or EU-derived instruments (as provided by clause 1). Whether, or to what extent, specific EU treaty or EU directive provisions were directly effective at the end of 2020 is a question that can sometimes only be answered with some degree of judicial input. Section 4 of EUWA only preserved effects*

¹¹ <https://researchbriefings.files.parliament.uk/documents/CBP-9638/CBP-9638.pdf> (page 27-28)

'of a kind' recognised by the CJEU or domestic courts before the end of the transition period

- b. *"The Government's Retained EU Law dashboard has sought to capture examples of section 4 of EUWA retaining rights, powers, liabilities, obligations, restrictions, remedies and procedures. However, it is unlikely, by its very nature, to be exhaustive, as the European Scrutiny Committee observed following its launch.*
 - c. *"The domestic effect of law retained by section 4 EUWA also cannot be understood in a vacuum. This is because EU regulations, EU directives, and domestic implementing legislation, were made against the backdrop of key EU treaty provisions having direct effect. Had there been no direct effect for the treaty provisions, those rights might instead have been contained more explicitly in the secondary EU legislation or UK implementing legislation."*
34. Notable legal effects that had been preserved by section 4 of the EUWA include, but are not limited to:
- a. The direct effect of relevant EU treaty provisions and of other treaties entered into by the EU; and
 - b. The vertical direct effect of EU directives.
35. The majority of farmed animal protections are contained in specific legislative provisions, so the revocation of treaty provisions under clause 4 of EUWA may have less pervasive implications for animal protection than in other areas.
36. However, the principle of vertical direct effect in relation to EU directives is what enables individuals to rely on them in the national courts when challenging the State. In other words, it provides a remedy for non-compliance with EU law by the State. This principle has been relevant to many of the farm welfare judicial review challenges, such as The Humane League's judicial review against the Government for permitting fast-growing chickens, which have relied in part on EU Directives.

Further provisions of the REUL Bill

37. Clause 4 of the REUL Bill abolishes the principle of supremacy of EU law. Clause 5 of the REUL Bill removes the general principles of EU law from UK law. These general principles are relied upon by the courts to enable them to interpret EU law. The principles include, but are not limited to: fundamental rights, proportionality, legal certainty, equality before the law, legitimate expectations, and subsidiarity. In the environmental policy space, the precautionary principle has also been accepted in the Court of Justice of the European Union case law as a general principle of EU law. These general principles are sometimes relied upon in judicial reviews, so the interpretation of animal protection law by the courts may change as a result of this revocation.

38. To the extent that EU law is not retained, the significance of the repeal of general principles may be minimal, since the principles specifically relate to the interpretation of EU law. However, if EU-derived law is retained, this raises questions about what principles the courts should apply when interpreting this law, if not EU-derived principles.
39. Clause 13(8) of the REUL Bill indicates that it is envisaged that certain principles of EU law may be “restated” in assimilated law, but it is not clear whether and how such restatements would be implemented.

Specific farm animal protection legislation in the context of the REUL

40. In order to assess how the above changes will affect some of the main EU-derived legislation relating to farmed animals, including transport and slaughter, the following must be considered. The sections below look at these areas to understand the risks that the REUL may pose across three major areas of farmed animal protection – general welfare, transport, and welfare at the time of killing.
- a. What are the current protections?
 - b. How do the protections interact with the REUL Bill?
 - c. What is the legal position if the EU-derived protections are revoked?

The Welfare of Farmed Animals Regulations (WOFAR)

41. The main pieces of legislation covering farmed animals in the UK are the Welfare of Farmed Animals (England) Regulations 2007, The Welfare of Farmed Animals (Wales) Regulations 2007, The Welfare of Farmed Animals (Scotland) Regulations 2010 and The Welfare of Farmed Animals Regulations (Northern Ireland) 2012 (together, these are known as “WOFAR”).
42. These regulations essentially implement the general EU Farming Directive¹² and specific EU directives for pigs,¹³ calves,¹⁴ broiler (meat) chickens¹⁵ and laying hens.¹⁶
43. These regulations apply to animals kept or bred for the production of food, wool, skin or other farming purposes; however, they do not apply to fish, reptiles or amphibians, animals used for competitions or sport, animals used in experiments, or animals living in the wild. They

¹² Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes

¹³ Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs

¹⁴ Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves

¹⁵ Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production

¹⁶ Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens

include general conditions under which farmed animals must be kept, and additional specific conditions for species in specified farming systems, such as laying hens in enriched or non-cage systems or the keeping of calves confined for rearing and fattening.

44. The minimum standards required for farmed animals are outlined in Schedule 1 to each of the UK Farmed Animals Regulations, which includes requirements relating to the following:
- a. Staffing: animals must be cared for by a sufficient number of staff who possess the appropriate ability, knowledge and professional competence.
 - b. Inspection: animals must be inspected at specified intervals depending on the type of husbandry system (once a day if their welfare depends on frequent human attention).
 - c. Record keeping: records relating to medical treatment and mortalities must be maintained for at least three years.
 - d. Freedom of movement: animals' movement must not be restricted in such a way as to cause them unnecessary suffering or injury, and if they are kept tethered or confined, they must be given the space appropriate to their physiological and ethological needs in accordance with good practice and scientific knowledge.
 - e. Buildings and accommodation: materials used for the construction of cages etc must not be harmful to animals, there must be adequate air circulation and animals must not be kept in constant darkness or constant artificial light.
 - f. Animals not kept in buildings: must have suitable protection from adverse weather and predators.
 - g. Automatic or mechanical equipment: if it is essential for the animals' health and wellbeing it must be inspected at least once a day and any defects rectified immediately. If that is not possible, suitable alternative arrangements must be made to maintain welfare.
 - h. Feed, water and other substances: animals must be fed a wholesome diet which is appropriate to their age and species and which is fed to them in sufficient quantity to maintain them in good health, to satisfy their nutritional needs and to promote a positive state of well-being. They should not be fed anything which causes them unnecessary suffering and have access to feed at intervals appropriate to their physiological needs (and at least once a day), unless a veterinary surgeon advises otherwise. Feeding and watering equipment must be designed, constructed, placed and maintained so that contamination of food or water and the harmful effects of competition between animals are minimised.
 - i. Breeding procedures: Natural or artificial breeding or breeding procedures which cause, or are likely to cause, suffering or injury to any of the animals concerned, must not be practised. Further, animals may only be kept for farming purposes if it can

reasonably be expected, on the basis of their genotype or phenotype, that they can be kept without any detrimental effect on their health or welfare.

- j. Electrical immobilisation: an electrical current must not be applied to an animal for the purpose of immobilisation.

45. There are also minimum standards for chickens bred for meat, laying hens, pigs, cattle, calves and rabbits. These minimum standards include:

- a. Laying hens: requirements to minimise sound levels and avoid sudden or constant noise, to have light levels which allow hens to see other hens clearly and investigate their surroundings, and for accommodation comprising two or more tiers of cages to have devices or to be organised to allow inspection of all levels without difficulty.¹⁷
- b. Chickens bred for meat: requirements about maximum stocking density (33 kilograms per m² of usable area) and notification of stocking density to the relevant authority, minimum lighting requirements (20 lux during the lighting periods, measured at bird eye level and illuminating at least 80% of the usable area) and the requirement to minimise sound levels.¹⁸
- c. Calves confined for rearing and fattening: a prohibition on confining calves to an individual stall after the age of eight weeks, minimum space requirements for calves, calculated according to their weight, and a requirement for calves to be checked at least twice a day if housed or once a day if kept outside.¹⁹
- d. Pigs: a prohibition on tethering pigs unless for a veterinary purpose, a requirement for accommodations to allow pigs to be able to stand up, lie down, turn around and rest without difficulty and a requirement for measures to minimise fighting to be used.²⁰
- e. Rabbits: hutches must be of sufficient size to allow the rabbits to move around and to feed and drink without difficulty and to allow them all to lie on their sides at the same

¹⁷ Welfare of Farmed Animals (England) Regulations 2007, Schedule 5; Welfare of Farmed Animals (Wales) Regulations 2007, Schedule 5; The Welfare of Farmed Animals (Scotland) Regulations 2010, Schedule 3; Welfare of Farmed Animals Regulations (Northern Ireland) 2012, Schedule 4

¹⁸ Welfare of Farmed Animals (England) Regulations 2007, Schedule 5A; The Welfare of Farmed Animals (Scotland) Regulations 2010, Schedule 2; Welfare of Farmed Animals Regulations (Northern Ireland) 2012, Schedule 5

¹⁹ Welfare of Farmed Animals (England) Regulations 2007, Schedule 6; Welfare of Farmed Animals (Wales) Regulations 2007, Schedule 6; The Welfare of Farmed Animals (Scotland) Regulations 2010, Schedule 4; Welfare of Farmed Animals Regulations (Northern Ireland) 2012, Schedule 6

²⁰ Welfare of Farmed Animals (England) Regulations 2007, Schedule 8; Welfare of Farmed Animals (Wales) Regulations 2007, Schedule 8; The Welfare of Farmed Animals (Scotland) Regulations 2010, Schedule 6; Welfare of Farmed Animals Regulations (Northern Ireland) 2012, Schedule 8

time and they must have access to shelter from the weather, including direct sunlight.²¹

The legal status of WOFAR under the REUL Bill

46. The question here is whether WOFAR is at risk of being revoked following the enactment of the REUL Bill in its current form. This comes down to whether it falls within the scope of the Bill and, if so, how. It should also be remembered that WOFAR went further than EU law in some respects,²² so a question also arises about the status of those further protections, which were a domestic legal creation rather than EU-derived laws.
47. As above, the categories of REUL that will expire at the end of 2023 (unless regulations are made to preserve them) are: EU-derived subordinate legislation (EDSL) and retained direct EU legislation (RDEUL). EU-derived *primary* legislation, on the other hand, will become part of assimilated law.²³
48. WOFAR is an interesting case because it was made under AWA (and the equivalent legislation in Scotland and Northern Ireland), which is primary domestic legislation; however, WOFAR itself is secondary legislation and it is likely that it would nevertheless be considered EDSL, and would therefore expire without intervention. In particular:
 - a. It is clear from the explanatory notes that it implements EU directives;
 - b. The sunset clause (at clause 1(5)) states that “domestic subordinate legislation” for the purposes of that clause means “any instrument (other than an instrument that is Northern Ireland legislation) that is made under primary legislation”. We note that the wording here is to capture any instrument made under (any) primary legislation, and it is not narrowed simply to instruments made under EU-derived legislation. In this case, the fact that WOFAR is made under AWA does not, therefore, appear to save it from revocation; and

²¹ Welfare of Farmed Animals (England) Regulations 2007, Schedule 9; Welfare of Farmed Animals (Wales) Regulations 2007, Schedule 9; The Welfare of Farmed Animals (Scotland) Regulations 2010, Schedule 7; Welfare of Farmed Animals Regulations (Northern Ireland) 2012, Schedule 9

²² For example allowing slightly more room for broiler chickens (Welfare of Farmed Animals (England) Regulations 2007, Schedule 5A) and prohibiting the use of stalls throughout a sow’s pregnancy, not just after the first four weeks (Welfare of Farmed Animals (England) Regulations 2007, Schedule 8)

²³ Examples of EU-derived primary law include the Competition Act 1998, The Weights & Measures Act 1985 and The Trade Union and Labour Relations (Consolidation) Act 1992

- c. The Government’s online “REUL Dashboard”²⁴ describes WOFAR as “EU-derived domestic legislation preserved under section 2 EUWA”.²⁵

49. On this basis, **there is a serious concern that even the additional protections which go further than the EU directives would fall away as there is no saving provision for non-EU-derived provisions in the sunset clause.**

What is the legal position if WOFAR is revoked?

50. If WOFAR was revoked, the default position would be that farmed animals would be protected under AWA (and the equivalent legislation in Scotland and Northern Ireland²⁶). This offers some relatively basic and general protections, including a prohibition on causing unnecessary suffering and a requirement to ensure that the needs of an animal are met “to the extent required by good practice”. Unlike the very detailed requirements that are set out in WOFAR, what is considered to be good practice for the purposes of AWA is set out in very general terms, and includes having regard to:

- a. The need for a suitable environment;
- b. The need for a suitable diet;
- c. The need to be able to exhibit normal behaviour patterns;
- d. The need to be housed with, or apart from, other animals; and
- e. The need to be protected from pain, suffering, injury and disease.

51. There is some additional detail set out in Codes of Practice made under AWA and its equivalent legislation in Scotland and Northern Ireland (for example, the Code of Practice for the welfare of laying hens and pullets (England),²⁷ and the Welfare of cattle: Code of Practice (Scotland)²⁸); however, these do not have any legislative force. Breach of a code does not constitute a criminal offence, albeit it may be evidence that a general offence under AWA has been committed.

²⁴<https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance>

²⁵ We note that there is a difference between “EU-derived subordinate legislation” and “EU-derived domestic legislation”. EDSL is a category of EDDL, being secondary as opposed to primary legislation. EU-derived primary legislation does not appear to be at risk of expiry under the sunset clause, whereas EU-derived subordinate legislation, which would include WOFAR, is at risk of expiry.

²⁶ Animal Health and Welfare (Scotland) Act 2006 and the Welfare of Animals Act (Northern Ireland) 2011

²⁷

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732227/code-of-practice-welfare-of-laying-hens-pullets.pdf

²⁸ <https://www.gov.scot/publications/code-practice-welfare-cattle/>

52. In the event that WOFAR does expire, it may be possible to consider some arguments that its protections continue to apply indirectly because they have established standard practices in UK farming. For example:
- a. Restricting an animal's movement in a way that exceeds the restrictions in WOFAR may cause suffering that could be considered "unnecessary", which could arguably be a breach of section 4 AWA (unnecessary suffering).²⁹
 - b. Failure to provide light levels which allow hens to see other hens clearly and investigate their surroundings, as currently required under WOFAR, could constitute a failure to meet the hens' needs to the extent required by good practice under section 9 AWA (duty of person responsible for animal to ensure welfare).³⁰
53. However, there would be significantly less certainty here and it would be a matter of judicial discretion as to how the protections would apply in practice and what would or would not constitute an offence under AWA. Furthermore, it would largely be a case of judges considering individual cases brought before them and not the industry as a whole.

Further provisions of WOFAR: Banned practices

54. In addition to the above commentary in relation to farming practices generally, we draw particular attention to certain practices which have been banned in the UK for many years, prior to any EU-wide bans, such as the use of veal crates and sow stalls.
55. Veal crates were banned in England, Wales and Scotland in 1990 under The Welfare of Calves Regulations 1987 and sow stalls were banned in England, Scotland and Wales in 1991 under The Welfare of Pigs Regulations 1991. These regulations were both repealed by The Welfare of Livestock Regulations 1994, which implemented early EU farmed animal directives. The 1994 Regulations have since been superseded and repealed by the current regulatory regime under WOFAR.
56. Given that the original regulations giving effect to the bans have now been repealed, unless WOFAR protections are preserved, the effect of the REUL Bill would be to overturn those bans. As above, however, it may be possible to argue that veal crates and sow stalls are not standard practice in the UK and as such their use may constitute an offence under AWA or the equivalent legislation in Scotland and Northern Ireland. However, this is not straightforward and may need to be argued on a case-by-case basis unless and until a further ban is enacted.

²⁹ <https://www.legislation.gov.uk/ukpga/2006/45/section/4>

³⁰ <https://www.legislation.gov.uk/ukpga/2006/45/section/9>

Transport of Farmed Animals Regulations

57. The main legislation governing the transport of animals in the UK is derived from the EU: Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations (the “EU Transport Regulations”).³¹
58. Unlike the farming directives, the protections relating to transport are contained in EU Regulations, which are directly applicable in the UK without any implementing legislation. However, the enforcement and administration of the EU Transport Regulations is dealt with by way of secondary domestic legislation, such as the Welfare of Animals (Transport) (England) Order 2006 (“WATEO”)³² which also creates some additional protections and goes further than the EU Transport Regulations in some respects. We refer to the English, Welsh, Scottish and Northern Irish transport rules as the “UK Transport Regulations”.
59. The EU Transport Regulations apply throughout the UK to the transport of all live vertebrate animals which takes place in connection with an economic activity, except for the transport of animals to or from veterinary practices under the advice of a veterinarian (Article 1). The protections are extended in England, Wales and Northern Ireland (but not Scotland) to cold-blooded invertebrate animals, and to the transport of animals which is not connected to economic activity.³³
60. The EU Transport Regulations impose a number of general requirements, which include ensuring that:³⁴
- a. No person shall transport animals or cause animals to be transported in a way likely to cause injury or undue suffering to them;
 - b. All necessary arrangements have been made in advance to minimise the length of the journey and meet animals' needs during the journey;
 - c. The animals are fit for the journey;
 - d. The means of transport are designed, constructed, maintained and operated so as to avoid injury and suffering and ensure the safety of the animals;

³¹ <https://www.legislation.gov.uk/eur/2005/1/contents>

³² : The Welfare of Animals (Transport) (England) Order 2006; The Welfare of Animals (Transport) (Wales) Order 2007; The Welfare of Animals (Transport) (Scotland) Regulations 2006; The Welfare of Animals (Transport) Regulations (Northern Ireland) 2006

³³ Welfare of Animals (Transport) (England) Order 2006, article 4(3); Welfare of Animals (Transport) (Wales) Order 2007, article 4(3); Welfare of Animals (Transport) Regulations (Northern Ireland) 2006, article 4(3)

³⁴ Council Regulation (EC) No 1/2005, article 3

- e. The loading and unloading facilities are adequately designed, constructed, maintained and operated so as to avoid injury and suffering and ensure the safety of the animals;
- f. The personnel handling animals are trained or competent as appropriate for this purpose and carry out their tasks without using violence or any method likely to cause unnecessary fear, injury or suffering;
- g. The transport is carried out without delay to the place of destination and the welfare conditions of the animals are regularly checked and appropriately maintained;
- h. Sufficient floor area and height is provided for the animals, appropriate to their size and the intended journey;
- i. Water, feed and rest are offered to the animals at suitable intervals and are appropriate in quality and quantity to their species and size.

61. The EU Transport Regulations also impose some additional technical requirements, as well as specific obligations that are imposed on organisers, transporters and keepers of animals. For example:

- a. A requirement to inspect the means of transport prior to the journey, which vary depending on the species and type of journey;³⁵
- b. Minimum health requirements to establish fitness for transport;³⁶ and
- c. Rules specifying the construction of means of transport, including that it should be designed so as to avoid injury, protect animals from inclement weather, and use anti-slip flooring.³⁷

62. Domestic secondary legislation,³⁸ such as WATEO, creates penalties for non-compliance. It also creates inspection regimes and grants powers to the Secretary of State to grant the authorisations and certificates required by the EU Transport Regulations.

³⁵ Council Regulation (EC) No 1/2005, article 7

³⁶ Council Regulation (EC) No 1/2005, Annex I

³⁷ Council Regulation (EC) No 1/2005, Annex I

³⁸ The Welfare of Animals (Transport) (England) Order 2006; The Welfare of Animals (Transport) (Wales) Order 2007; The Welfare of Animals (Transport) (Scotland) Regulations 2006 and The Welfare of Animals (Transport) Regulations (Northern Ireland) 2006.

The legal status of the transport protections under the REUL Bill

63. As above, the categories of REUL that will be revoked at the end of 2023 (unless regulations are made to preserve them) are: EU-derived subordinate legislation (EDSL) and retained direct EU legislation (RDEUL). EU-derived *primary* legislation, on the other hand, will become part of assimilated law.³⁹
64. It should be remembered here that while the majority of EDSL consists of regulations made under section 2(2) of the ECA, it also includes:
- a. Orders in Council made under section 2(2) ECA
 - b. Other delegated legislation if it refers to EU instruments; and
 - c. Delegated legislation made under other enactments, but for the purposes of implementing (what were then) EU obligations.
65. There are several pieces of legislation to consider in connection with the transport rules, and some differences between the countries in the UK. Firstly, the EU Transport Regulations are RDEULs and as such, they would be revoked by the enactment of the REUL Bill. This means that the majority of the protections would fall away automatically. The domestic legislation, however, are not RDEULs and need to be considered separately.
66. Furthermore, there is an additional protection in the English, Welsh and Northern Irish legislation which creates an offence of transporting an animal in a way which causes or is likely to cause injury or unnecessary suffering, which is not contained in the EU Transport Regulations.⁴⁰ So the question remains whether this too would fall away.
67. In Northern Ireland, the relevant secondary legislation is made explicitly under section 2(2) of the ECA, so this would be EDSL falling within the scope of the sunset clause and be revoked (clause 1(4)(a) REUL Bill).
68. The position is less clear in England and Wales. The introductory text provides that the English and Welsh Orders are made in the exercise of powers conferred by the Animal Health Act 1981, and the explanatory notes state that they “make provision for the administration and enforcement” of the EU Transport Regulations. In other words, they are not *implementing* legislation, but legislation that makes other provisions connected with EU legislation. The English and Welsh Orders may therefore fall within the category above of “*Delegated legislation if it refers to EU instruments*” or “*Delegated legislation made under other*

³⁹ Examples of EU-derived primary law include the Competition Act 1998, The Weights & Measures Act 1985 and The Trade Union and Labour Relations (Consolidation) Act 1992

⁴⁰ The Welfare of Animals (Transport) (England) Order 2006, article 4(1); The Welfare of Animals (Transport) (Wales) Order 2007, article 4(1); The Welfare of Animals (Transport) Regulations (Northern Ireland) 2006, regulation 4(1)

enactments, but for the purposes of implementing (what were then) EU obligations”, and therefore EDSL, which would be revoked under the REUL Bill if enacted.

What is the legal position if the EU and UK Transport Regulations are revoked?

69. As above in relation to WOFAR, unless there was some preservation of the regulations around farmed animal transport, the default position would revert to the basic protections under AWA (see above).
70. As before, it may be possible to argue that the protections continue to apply indirectly because they have established standard practices in UK farming; however, for the same reasons as above this would not be straightforward, there would be significantly less certainty and it would be a matter of judicial discretion as to how the protections would apply in practice and what would or would not constitute an offence under AWA.
71. There is also an important difference here compared to WOFAR, which is that the main protections are contained in Council Regulation (EC) No 1/2005 rather than in EU-derived domestic legislation, so even if the UK Transport Regulations remained in force, it is likely that the majority of the provisions would fall away because they relate to enforcement of the EU Transport Regulations, which would have been revoked (unless preserved).
72. There is also concern that even the additional offence in England, Wales and Northern Ireland of transporting an animal in a way which causes unnecessary suffering would fall away as there is no saving provision for non-EU-derived provisions in the sunset clause.

The Welfare of Animals at the Time of Killing (WATOK)

73. As with the transport rules, the main legislation which governs the slaughter of animals is derived from the EU and it is enforced in the UK through domestic legislation which creates offences and imposes penalties for non-compliance. The main piece of legislation from the EU is Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (“PATOK”).
74. The domestic legislation is The Welfare of Animals at the Time of Killing (England) Regulations 2015, The Welfare of Animals at the Time of Killing (Wales) Regulations 2014, The Welfare of Animals at the Time of Killing (Scotland) Regulations 2012 and The Welfare of Animals at the Time of Killing Regulations (Northern Ireland) 2014 (together, “WATOK”).
75. PATOK applies to animals bred or kept for the production of food, wool, skin, fur or other products as well as the killing of animals for the purpose of depopulation and for related operations. As regards fish, only very minimal protections apply (being that they must be spared any avoidable pain, distress or suffering during their killing and related operations⁴¹).⁴²

⁴¹ Council Regulation (EC) No 1099/2009, article 3(1)

⁴² Council Regulation (EC) No 1099/2009, article 1

It does not apply where animals are killed during lawful scientific experiments, during hunting or recreational fishing activities, during cultural or sporting events, or to poultry, rabbits and hares slaughtered outside of a slaughterhouse by their owner for his/her private domestic consumption.⁴³

76. The English, Welsh and Northern Irish WATOKs create protections for animals who are not included in PATOK, being (i) reptiles and amphibians, (ii) invertebrate animals and (iii) poultry, rabbits or hares killed elsewhere than in a slaughterhouse by their owner for the owner's private domestic consumption.⁴⁴

77. PATOK imposes general requirements for the slaughter of animals, with some additional requirements for slaughterhouses and some relaxed requirements in the event of emergency killings of animals who are injured or have a disease associated with severe pain or suffering and where there is no other practical possibility to alleviate this pain or suffering or depopulation for public health, animal health, animal welfare or environmental reasons.

78. The general requirements include, but are not limited to:

- a. Animals shall be spared any avoidable pain, distress or suffering during their killing and related operations.⁴⁵
- b. Business operators should take the necessary measures to ensure that animals are provided with physical comfort and protection, are protected from injury, are handled and housed taking into consideration their normal behaviour, do not show signs of avoidable pain or fear or exhibit abnormal behaviour, do not suffer from prolonged withdrawal of feed or water and are prevented from avoidable interaction with other animals that could harm their welfare. Facilities used for killing and related operations should be designed and constructed to ensure compliance with these obligations.⁴⁶
- c. Animals shall only be killed after stunning in accordance with the methods specified in Annex I, and loss of consciousness and sensibility must be maintained until the death of the animal.⁴⁷

79. The additional requirements applicable to slaughterhouses include, but are not limited to:

- a. Slaughterhouses should meet the technical requirements in Annex II, which include things like ventilation and drainage requirements, as well as specific requirements for different slaughter methods (for example, gas stunners shall be equipped to measure

⁴³ Council Regulation (EC) No 1099/2009, article 1(3)

⁴⁴ The Welfare of Animals at the Time of Killing (England) Regulations 2015, regulation 28 and Schedule 4; The Welfare of Animals at the Time of Killing (Wales) Regulations 2014, regulation 28 and Schedule 4; The Welfare of Animals at the Time of Killing Regulations (Northern Ireland) 2014, regulation 21 and Schedule 4

⁴⁵ Council Regulation (EC) No 1099/2009, article 3(1)

⁴⁶ Council Regulation (EC) No 1099/2009, article 3(2) and (3)

⁴⁷ Council Regulation (EC) No 1099/2009, article 4

continuously, display and record the gas concentration and the time of exposure, and to give a clearly visible and audible warning if the concentration of gas falls below the required level).⁴⁸

- b. The operational rules set out in Annex II should also be complied with. These include requirements such as ensuring animals are unloaded as quickly as possible after arrival and subsequently slaughtered without undue delay.⁴⁹

80. If the killing is undertaken for depopulation (in other words, public health, animal health, animal welfare or environmental reasons), PATOK requires the competent authority to establish an action plan to ensure compliance with the provisions therein; however, it does permit derogation from one or more of its requirements but only when compliance is likely to affect human health or significantly slow down the process of eradication of a disease.⁵⁰

81. In the case of an emergency killing (in other words, the killing of animals who are injured or have a disease associated with severe pain or suffering and where there is no other practical possibility to alleviate this pain or suffering), PATOK provides that none of the provisions in the regulations shall apply save for the basic requirements in Article 3 to spare animals avoidable pain, distress or suffering during their killing and related operations and to take the specified measures to ensure that is the case, and the keeper of the animals concerned shall take all the necessary measures to kill the animal as soon as possible.⁵¹

82. WATOK creates some additional requirements which are not contained in PATOK. These vary across the different countries in the UK; however, they include things like:

- a. Additional requirements for slaughterhouses: these include things like ensuring that field lairages are maintained to ensure that no animal is subjected to health hazards, ensuring that stunning pens for bovine animals restrict the movement of the head of the animal so as to permit accurate stunning and instructing a competent person to inspect the animals at least every morning and evening.⁵²
- b. Additional requirements for killing animals other than in slaughterhouses: these include things like a prohibition on the use of a non-mechanical percussive blow to the head, except for killing rabbits, a prohibition on the use of shackle lines (save in specified circumstances) or the suspending of animals other than poultry.⁵³
- c. Killing in accordance with religious rites: the provisions provide, for example, that a person who kills a sheep, goat or bovine animal without prior stunning must ensure it

⁴⁸ Council Regulation (EC) No 1099/2009, article 14

⁴⁹ Council Regulation (EC) No 1099/2009, article 15

⁵⁰ Council Regulation (EC) No 1099/2009, article 18

⁵¹ Council Regulation (EC) No 1099/2009, article 19 and article 1(2)

⁵² The Welfare of Animals at the Time of Killing (England) Regulations 2015, regulation 25 and Schedule 1, para 1

⁵³ The Welfare of Animals at the Time of Killing (England) Regulations 2015, regulation 26 and Schedule 2

is killed by the severance of both its carotid arteries and jugular veins by rapid, uninterrupted movements of a hand-held knife, and that immediately before the killing the knife is inspected to ensure that it is undamaged and of sufficient size and sharpness to kill the animal.⁵⁴

The legal status of PATOK and WATOK under the REUL Bill

83. In the introductory text to each of the UK WATOK Regulations, it confirms that they make provision for a purpose mentioned in section 2(2) of the ECA and that they are made in the exercise of powers under paragraph 1A of Schedule 2 to the ECA.
84. As above, the categories of REUL that will be revoked at the end of 2023 (unless regulations are made to preserve them) are: EU-derived subordinate legislation (EDSL) and retained direct EU legislation (RDEUL). EDSL is further defined in the sunset clause to include domestic subordinate legislation made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972. **As such, WATOK is likely to constitute EDSL and is likely to be revoked by the REUL Bill if enacted as drafted.**
85. PATOK are EU-derived regulations and therefore RDEUL. It would also be revoked by the REUL Bill if enacted as drafted.

What is the legal position if PATOK and WATOK are revoked?

86. As before, unless there was some preservation of the regulations relating to the killing of farmed animals, the default position would revert to the basic protections under AWA (see above). It may be possible to argue that the protections continue to apply indirectly because they have established standard practices in the UK; however the same concerns as above apply, including that this would not be a straightforward argument, there would be significantly less certainty and it would be a matter of judicial discretion (on a case by case basis) as to how the protections would apply in practice and what would or would not constitute an offence under AWA.
87. Furthermore, as above in relation to the general farming and transport protections, it is not clear what would happen to the protections in WATOK which go further than PATOK, but it seems likely that they would also fall away because there is no saving provision for non-EU-derived provisions in the sunset clause.

⁵⁴ The Welfare of Animals at the Time of Killing (England) Regulations 2015, regulation 27 and Schedule 3 (note that this protection does not apply in Scotland)

Summary

88. As explained in this note, there is a real risk that significant farmed animal protection laws will be revoked on the enactment of the REUL Bill as drafted, unless they are specifically preserved by statutory instrument.
89. You will note that Advocates for Animals have also suggested that in the event that the protections are not preserved, it may be possible to rely on AWA on the basis that these EU-derived practices have become industry standards. As such, in an assessment of whether suffering caused to a farmed animal is “necessary”, a judge might be invited to consider the relevant EU law, even if repealed, in order to make a decision on what is necessary in order for the industry to operate. For example, if a farm was keeping sows in small stalls for extended periods, it could be argued that this is not necessary based on historical practices under the EU regime.
90. That said, this situation would impose significant burdens on the court and prosecutors, as there would be no overarching regime, and non-compliance may need to be dealt with on a case-by-case basis where there has been a demonstrable criminal offence. It is possible that one judgment could set a precedent that could be relied upon in future cases, but this will be no replacement for the detailed technical requirements set out in the existing EU legislation.

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